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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NOAH JOSEPH ATKINS, Defendant and Appellant.	E031273 (Super.Ct.No. FVI08481) OP I N I O N

APPEAL from the Superior Court of San Bernardino County. Stephen A. Ashworth, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner Sobeck and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Noah Joseph Atkins, appeals his conviction of kidnapping for purposes of rape. He raises a single contention on appeal, that the trial

court gave an erroneous impromptu instruction to the jurors which, arguably, improperly limited the jurors' consideration of lesser included offenses.

We conclude the contention is without merit, and we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The victim lived in Victorville with her two small children. She worked at a taco stand in the same city and often took a bus to work. On July 6, 1998, before going to work, the victim took the children to her mother's home; her mother frequently watched the children while the victim was at work. Leaving her mother's home, the victim walked through an alley toward her bus stop. It was approximately 3:00 p.m.

As the victim walked through the alley, a gray, two-door Thunderbird pulled up alongside her. Defendant was driving; another man was in the passenger seat. Defendant asked for directions to a destination a short distance away. The victim answered and resumed walking.

The car remained stopped for a few moments. The passenger alighted and followed the victim; defendant pulled the car up alongside the victim. The passenger grabbed the victim's hair and shoved her inside the car. The passenger slid into the back seat and defendant drove away.

The victim saw that defendant held a gun between his legs. He ordered her to "[d]o what I say and you won't get hurt." Defendant grabbed the victim's hair and held her head down as he drove away.

Defendant stopped a short while later on a dirt road in a desert area, near the Mojave River. The victim described a series of events, in which defendant ordered her to take her pants down, she refused and tried to run away, and defendant then managed to pull down both his own and the victim's pants. Defendant ordered the victim to orally copulate him and he attempted to penetrate her vagina, but he was unable to achieve an erection. Defendant ordered the victim to orally copulate his companion as well, but the passenger declined.

Defendant also made the victim suck his penis, and he drove further down the dirt road. Defendant said he would let the victim go if she would help him reach a climax. The victim again attempted to escape, opening the door, but defendant jerked the car forward, causing the door to slam onto the victim's leg.

Defendant continued to demand that the victim orally copulate him. At another point, he stopped the car. The victim grabbed the car keys, jumped out, and started to run away. Defendant chased her down, grabbed her by the throat, and dragged her back to the car.

Defendant shoved the victim down onto the car seat, pulled down her pants and underwear, and pulled out his penis. According to the victim, defendant had by then achieved an erection. He put his penis into her vagina. The victim also related that defendant ejaculated.

Defendant offered to take the victim back to Victorville, but she declined. She gathered up her purse, which had fallen on the ground, and ran. She saw the car drive away.

The victim tried to get the license number; she wrote the first three characters, 3GL, on a scrap of paper.

The victim ran to some nearby apartments and knocked on doors, until someone let her in.

Melanie and Ryan G., age 17 and 14, respectively, testified that the victim came to their apartment. Melanie testified that the victim was crying, and makeup was running down her face. The victim stated that she had been raped, that "they" had a gun, and that "they" were "still out there." The victim asked to use the telephone to call her work to ask someone to come pick her up.

Melanie suggested that the victim call the police. The victim replied, "okay," and Melanie dialed 911.

Ryan corroborated his sister's account. A stranger, the victim, had come to the door, saying she had been raped. The victim wanted to call her work; Ryan watched her make the call. When the police arrived, Ryan heard the victim say that two men in a car had taken her into the desert. The apartment backed up to a large, open, desert-like field. The field bordered on a wash leading to the Mojave River.

Both Melanie and Ryan described seeing an older, silver or gray car outside, shortly after the victim came to their apartment. Ryan described the car as a 1980's

Thunderbird. He saw two people inside. The car was approximately 50 yards away, moving slowly.

The victim was taken to the hospital at approximately 6:00 p.m., and examined almost two hours later. A semen specimen collected from the victim was shown by DNA analysis to belong to the victim's boyfriend. The victim and her boyfriend had had unprotected sex the night before the attack.

Law enforcement officers followed up on the victim's report. They traced the partial license plate number the victim had given them, "3GL," to a gray 1986 Ford Thunderbird, license number 3GLX687, registered to defendant's address, approximately three or four miles away from the crime scene.

Defendant's car not only matched the make, model, color and year described by the victim and Melanie and Ryan, the car also had a child safety seat in the rear, a detail the victim had given in her statement. The victim also described a tattoo of a "face" on her attacker's arm. Defendant had a clown tattoo.

Defendant agreed to be interviewed at the sheriff's station. Initially, defendant denied any involvement and claimed he had been at home at the time of the attack.

Later, he changed his story and said that he had picked up a prostitute on his way to school. Defendant claimed he had paid the prostitute $20 for oral sex. He described driving to a deserted area, and denied there was a ever a second man in the car.

The investigating officers prepared a photographic lineup; the victim identified defendant as her attacker.

At trial, the prosecution's criminalist opined that it would be possible for defendant to have raped the victim without leaving DNA; there may have been no penile intercourse, the attacker may have used a condom, or he may not have ejaculated. In addition, poor specimen collection procedures or evidentiary degradation could account for the failure to find traceable DNA samples. As noted, the victim was not examined until approximately two hours after she was taken to the hospital. In addition, the hospital failed to use several diagnostic tools: no ultraviolet lamp was used, no colposcope was used, and no blue dye -- commonly applied to highlight vaginal tears -- was used.

A sexual assault expert testified that it is not unusual for semen to be absent after either oral or genital sex.

The defense argued two theories: either that the events never happened at all, or, that the victim was a prostitute who had been paid for oral sex. Defendant presented the testimony of his father and his girlfriend that he was a gentle, nonviolent person. Defendant's girlfriend also testified that she had never known him to have problems achieving an erection.

Officers searched defendant's home, but never found a handgun. Defendant's father and girlfriend told officers that defendant did not own any handguns.

Defendant also relied on forensic evidence. Samples taken from the victim showed no sperm on the vaginal swab, the unstained vaginal slide, the oral slide or the fingernail scrapings. The only sample with traceable sperm was on the victim's perennial

swab. The criminalist excluded defendant as a donor of that sperm; the sample matched the victim's boyfriend.

Defendant was charged with one count of kidnapping for the purpose of committing a sex crime, one count of attempted rape, one count of rape, and two counts of forcible oral copulation.

The jury found defendant guilty of the kidnapping-for-sex offense, but was unable to reach a verdict on any of the sexual charges. Those charges were ultimately dismissed.

The court sentenced defendant to life with the possibility of parole on the kidnapping offense. Defendant now appeals.

ANALYSIS

The sole contention on appeal is that the court, in response to a jury inquiry, gave an erroneous instruction which improperly constrained the jury's consideration of lesser included offenses.

During deliberations, the jury sent an inquiry to the court: The jury asked for a copy of one of the police reports, requested to view the crime scene, and asked for some of the testimony to be read back. Both counsel agreed that the court could go into the jury room, with the court reporter, to answer the juror's questions.

While the court was in the jury room, juror No. 7 asked an additional question: "I just had a question on the order for individual charges. Can we deliberate and find a verdict on the lesser charges before we deliberate and find a verdict on the main charge?"

The court replied, "You cannot. As I indicated in the instructions, [i.e., the court had already instructed with CALJIC No. 17.10] . . . you cannot convict anybody on a lesser charge until he's acquitted of the greater charge. That's what allows you to move on, but you can consider anything before reaching any verdict."

Juror No. 7 indicated that he understood the court's explanation. The court then stated, "You don't have to sign any forms or anything, you can talk about anything you want. Okay."

The court left the jury to resume its deliberations, reconvening with counsel, the court had the reporter read back the jury-room questions and answers. Defense counsel remarked, "They can consider lessers before they make a finding of not guilty on the greater?" The court replied, "Exactly. That's what I told them, and they all seemed to understand."

Defendant contends that the court's response to juror No. 7 was an incorrect statement of the law.

Defendant argues that the court's response may have confused the jurors; they may have interpreted the court's remarks as precluding them even from deliberating on a lesser charge until a verdict of acquittal could be reached on the greater offense.

Defendant's contention focuses too narrowly on only portions of the juror's question and the court's answer. Indeed, defendant's brief represents that, "Juror 7 was asking if jurors could deliberate on the lesser offense before acquitting [defendant] of the greater." This distorts the juror's question, however; juror No. 7 actually inquired, "Can

we deliberate *and find a verdict* on the lesser charge before we deliberate *and find a verdict* on the main charge?" (Italics added.) The juror's question was not limited to the order of deliberation, but encompassed the order of returning verdicts.

The correct rule is that a "jury may not *return a verdict* on the lesser offense unless it has agreed beyond a reasonable doubt that defendant is not guilty of the greater crime charged, but . . . a jury [should not be prohibited] from *considering* or *discussing* the lesser offenses before returning a verdict on the greater offense."[1]

The court's admonition was wholly consistent with this rule. Juror No. 7 asked if the jury could deliberate and return a verdict on the lesser charge before deliberating and reaching a verdict on the greater charge. The correct answer to this question is "no." That is precisely what the court said. The court went on to explain, again correctly, that "you cannot *convict*" -- i.e., return a verdict -- "on a lesser charge until he's acquitted," -- again, upon a verdict -- "of the greater charge." Finding, beyond a reasonable doubt, that a defendant should be acquitted of the greater charge, "allows you to move on, but *you can consider everything before reaching any verdict.*" (Italics added.)

Far from "cutting off" jury discussions of lesser offenses, the court specifically told the jurors that they could consider any matters in any order: "You don't have to sign any forms or anything, *you can talk about anything you want.*" (Italics added.) These remarks adequately conveyed to the jury that issues could be discussed in any order before verdict forms were signed.

We also note that the jury had been originally, properly, instructed with CALJIC No. 17.10, which sets forth the correct law. The court's response to the jury inquiry reiterated the identical standards. The phrasing may not have been as precise as that contained in the standard instruction, but there was nothing in the court's remarks which was inconsistent with the correct statement of the law. The court's response was proper; the jury was not misled. Reversal is not required.

DISPOSITION

The judgment is affirmed.

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/s/ Ward
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.

[footnote continued from previous page]

1 *People v. Kurtzman* (1988) 46 Cal.3d 322, 329.